

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH SICA,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

CLOSING BRIEF

OF

APPELLANT JOSEPH SICA

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OF

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TO THE HONORABLE HEAD JUDGE AND JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

COMES NOW the Appellant, JOSEPH SICA, and files this
his Closing Brief.

PRELIMINARY STATEMENT

There are a number of defendants in this case, as
the Court has been previously informed, and each has filed

a brief. We respectfully ask permission to adopt the arguments, and points and authorities in support thereof, filed and referred to in the Closing Briefs of the other appellants.

We have not answered each particular point or each argument advanced in the Government's Brief for the reason that we believe we have answered such arguments in our Opening Brief and, in the interest of brevity, have not referred to them here.

I

THE COURT ERRED IN PERMITTING THE WITNESS
LEONARD, ON BEHALF OF THE GOVERNMENT,
AND THE WITNESS NESSETH, ON BEHALF OF
THE GOVERNMENT, TO TESTIFY CONCERNING
THE REPUTATION OF APPELLANT SICA AS AN
UNDERWORLD FIGURE AND A STRONG-ARM MAN.

In our Opening Brief, we referred the Court to the case of Michelson v. United States, 335 U. S. 469, and the argument advanced therein in behalf of our contention that it was gross error on the part of the Court to permit the Government to put into evidence the reputation of Appellant Sica as an underworld figure and a strong-arm man at almost the inception of the case and in the Government's case-in-chief, and from the lips of their principal witnesses, Leonard and Nesseth.

The force of the argument of the Government is that Michelson is not applicable or that the rules should be extended. Michelson is a solid, seasoned decision of the Supreme Court of the United States, has been referred to in other cases, and should not be disturbed. The theory of it goes unchallenged, even by the Government. It was and is our contention that the Government could not prove in its case-in-chief the reputations of the Defendants Sica and Dragna. The matter was plainly brought to the attention of the Court by way of objection by Sica (RT 707, 708).

As was said in Michelson v. United States, 335 U. S. 469, at 474, 475:

"Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character (Greer v. United States, 245 U.S. 559, 62 L.Ed. 469, 38 Sup.Ct. 209), but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime."

To the same effect was the case of Benton v. United States, 233 Fed. 2d 491, citing Michelson with approval.

The reasoning of these cases has not been answered by Government's counsel.

The Government seeks to distinguish Michelson and Benton and refers to the following cases, which we contend are not in point and may be readily distinguished, as follows:

United States v. Compagna, 146 Fed. 2d 524,
Cert. den. 324 U. S. 867, Reh. den. 325
U. S. 892.

In this case, proof was given that the conspiracy was created solely for the control of the union and the union was the instrument used. The threats were made directly to the complaining witness by the individuals on trial.

Nick v. United States, 122 Fed. 2d 660,
Cert. den. 314 U. S. 687, Reh. den.
314 U. S. 715.

In this case, again, we have the problem of controlled labor union and the domination of the industry on a local level. Case deals only with the extortion and not with the proof thereof.

Bianchi v. United States, 219 Fed. 2d 182,
Cert. den. 349 U. S. 915, Reh. den. 349
U. S. 969.

This was again a labor dispute and the individuals on trial were the heads of the union who threatened to prolong a strike unless a payoff was made.

These cases fail to meet the basic contention of the appellant that the Court committed reversible error in allowing the prosecution to enter evidence of his character and reputation before he had offered any evidence whatsoever. It therefore appears the prosecution attempted to present its case by bootstrapping in evidence. Such practice is akin to the field of search and seizure, wherein an officer takes a person into custody, illegally searches his house and finds incriminating evidence and then uses such evidence as the basis of a complaint against the individual. In such cases our Courts are now unanimous in striking down the use of such tactics to obtain convictions.⁽¹⁾

(1)

See: Johnson v. United States, 68 Sup.Ct. 367, 333 U.S. 10, 12,13;
People v. Cahan, 44 Cal.2d 434, Supreme Court of California cited with approval in Elkins v. United States, 364 U. S. 216;
Jones v. United States, 357 U.S. 493, 499, 2 L.Ed. 1514, 78 Sup.Ct. 1253. There the Court said:
"Exceptions to the rule that a search must rest upon a search warrant have been jealously guarded and carefully drawn."
(Cited in Mosco v. United States, 301 Fed. 2d 180, 187.)

So too, the Courts must not allow evidence of the nature used in the present case to be received as it was to sustain a conviction.

The Court erred in allowing the Government's witnesses Leonard and Nesseth to refer to the Appellant Sica's reputation as Leonard did:

"Q. BY MR. GOLDSTEIN: What was there about Mr. Sica's presence at the Beverly Hilton Hotel that evening which inspired fear in you?

"OBJECTION. * * *

"A. Well, by reputation I have always known of Joe Sica as an underworld man and a strong-arm man." (RT 719, 722)

Nesseth, Leonard's associate if not partner, on direct examination by the Government in its case-in-chief, was questioned about Sica:

"Q. Now what did you know of the Defendant Sica by reputation?

"OBJECTION. (Overruled)

"A. I knew Sica by reputation only as being an underworld figure." (RT 1865)

By this testimony, and over objection, the Government itself opened the question of the Appellant Sica's character and reputation, strictly in violation

of the rules laid down in Michelson, supra. The cases and citations against such practice are legion.

It was said in Witkin, California Evidence, p. 128:

"Hence, the universal rule prohibits the prosecution from introducing it in the first instance, i.e., where the defendant has not offered evidence of his good character."

See also McCormick, Evidence, p. 324, and
1 Wigmore 55, 57, 1940 Ed.

The cases the Government cites fail to meet the basic contention that the prejudices leveled against the appellant were so great that the limiting instruction given by the Judge could not have impressed upon the minds of the jurors, as laymen, the very limited nature for which he had allowed the evidence to be entered, when the entrance was, from the beginning wrong. It is upon this fact that many a juror has inferred inadmissible facts from statements allowed to be entered into evidence. It seems that the most inept jury instruction a Judge can give to a jury, or one man to another, is to disregard something that he had heard, or to apply it only to one particular situation. (2)

(2)

No instruction to the jury could cure this error. As said in Krulewitch v. United States, 336 U.S. 440, at 453:

"The naive assumption that prejudicial effects can be overcome by instructions to the jury (Blumenthal v. United States, 332 U.S. 539, 559, 92 L.Ed. 154, 169), all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore and Ohio Railroad Co., 167 Fed.2d 54."

This becomes more gross when taken in the light of the facts that the trial herein involved spanned more than four months and the transcript was more than 7,500 pages, not to mention the detail and amount of exhibits that were presented on either side.

Man is not like a computer; he cannot be programmed to retain and reject certain facts when all the material is given to him at one time. Once a word is spoken to him his imagination and prejudices play upon it until his mind's eye has conjured up a picture, even though he may not have understood the context or meaning of the word when originally spoken, and even though he may later be told to disregard the picture he has perceived.

Such ambiguous and imaginative words as "underworld character" and "strong-arm man", etc., are colored to begin with and to allow the jury to be constantly besieged by them when no basis for their use has been laid, is prejudicial to the Appellant.

Such assertions attack the character and reputation of the Appellant without allowing an adequate avenue of rebuttal, and without his having opened the question to begin with.

Wigmore decries the use of such tactics, asserting what is known to be the general rule:

"For example, the moral disposition of an accused may be probatively of considerable value as indicating the probability

of his doing or not doing a particular act or crime, yet it may be excluded because of the undue prejudice liable to be caused by taking it into consideration; for its probative value may be exaggerated, and condemnation be visited upon him, not for the act, but virtually for his character." (Emphasis ours)

1 Wigmore 29a, p. 412.

The effect of the introduction of this testimony was too clearly to show a proclivity to commit crime and thus blacken, to his prejudice, the character and reputation of the Appellant.

In the present case, the probative value of the evidence was far outweighed by the prejudicial nature thereof. The prosecutor was allowed to crucify the character of the Appellant before he had even put such into question, and was against all authorities on the subject. The end result of this type of tactics is recognized by the following excerpt from Wigmore:

"There is a deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is in the Court."

1 Wigmore 57, p. 456, 1940 Ed.

This was aggravated by the prosecutor's asking Sica concerning the conviction of a felony when, in truth and in fact, it was a misdemeanor, which subject we have fully treated in our Opening Brief, and it has not been answered by the Government. They must have known that

Sica's conviction was a misdemeanor and, contrary to the impression the Government would give concerning this item that the Court treated it lightly, the Court condemned the prosecutor in no uncertain fashion in this language. We direct the Court's attention to the record (RT 5408, 5411), where we moved for a mistrial. The subject is fully treated in our Opening Brief, beginning at page 52.

As the Court said:

"I think the prosecutor is to be censored for not having looked up the law. In the law schools they teach you that this matter of impeachment upon a prior conviction of a felony is of such seriousness that you must always be prepared to back it up to the hilt if you ask the question."

See our Opening Brief, p. 57, for a full treatment of this incident.

This subject was treated in the case of People v. Albertson, 145 Pac. 2d 7, 21, where the Court said, dealing with evidence of other offenses:

"In the first place, the collateral offense for which an accused has not been tried tends to prove his inclination towards crime, that is, to render more probable his guilt of the charge under trial, which is an absolute violation of the rule. It does not reflect in any degree upon the intelligence, integrity, or the honesty of purpose of the juror that matters of a pre-judicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted

to consider and that which he is not. Because of this lack of training, he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowledge."

Here the prosecution was able to strike a body blow against the Appellants Sica and Dragna by this evidence introduced in its case-in-chief, and prejudice was multiplied by the questions put to Sica, particularly in connection with the misdemeanor conviction. No amount of instructions could cure this error. This situation, we respectfully suggest, requires reversal.

(3)

(3)

In the case of Brinegar v. United States, 338 U.S. 160, at 172, the Court said:

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common law tradition, to some extent embodied in the Constitution, has crystalized into rules of evidence consistent with that standard.

"These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeiture of life, liberty and property."

INCIDENTS WHICH DENIED
SICA A FAIR TRIAL.

(A) The Daly conversations.

There was no connection between Daly and Sica -- part of the conversations between Leonard and Daly were illicited by Leonard deliberately for the purpose of getting some expressions for the recording.

The comment of the attorneys for the Government, namely, "Daly described Leonard's danger in a fine Italian hand" (Appellee's Brief, p. 280), has no place in a brief filed by a representative of a Government engaged in a commendable struggle against the forces of race prejudice and discrimination in this country.

(4)

The definition of "fine Italian Hand", as given in BREWER'S DICTIONARY OF PHRASE AND FABLE, is as follows:

"ITALIAN HAND. 'I see his fine Italian hand in this' may be said of a picture in which the beholder can discern the work of a particular artist through certain characteristics of his which appear. Or it may be remarked of an intrigue, in which the characteristics of a particular plotter are apparent. The Italian hand was originally the cancelleresca type of handwriting used by the Apostolic Secretaries, and distinguishable by its grace and fineness from the Gothic styles of Northern Europe."



(B) The Chargin anonymous phone call -
the threat.

The Appellee relies on two cases to sustain its contention that the evidence of the anonymous telephone call to Chargin was admissible. One big difference appears in the fact situations of those cases which distinguish them to the point of inapplicability.

In People v. Vitusky, 155 App.Div. 139, 152-153, 140 N.Y.Supp. 24, 29 (1st Dept. 1913), from which the Government quotes extensively, there was an actual threat communicated by the defendant and within 36 hours thereof the event he threatened took place. The Court allowed the threat to be shown because of the surrounding circumstances and the fact that the event which took place was the actual one threatened.

In the present case, the only evidence adduced by the prosecution as a basis for entering the phone call was the fact that the Appellant had asked Dros when Chargin was arriving in town. He had been friendly with Chargin before and knew where to reach him in Oakland, because they had had previous business contact.

As a general rule, telephone conversations are exceptions to the hearsay rule and their entrance into evidence can only be allowed where a proper foundation is laid and the caller's voice has been identified.

In the present case, the prosecution seeks to

attribute the responsibility for the anonymous phone call to Chargin to Appellant Sica without complying with these requirements. The well established case law is against such practice.

See Rueckheim Bros. and Eckstein v. SerVis Ice Cream and Candy Co., (1909), 146 Ill. App. 607, where an attempt was made to prove three sales contracts by telephone conversations. The Court held, *inter alia*, it was error to permit conversation between witness and some unknown person, without in any way connecting such unknown person with the defendant, no such proof being offered to show that such person was authorized by or connected with the defendant.

In a note in 71 A.L.R. 7,60, examples of excluded evidence in criminal cases where there has been no tie-up with the defendant are given. This article is cited in State v. Silverman, 148 Ore. 296, 36 Pac. 2d 342:

"Communications through the medium of the telephone may be shown in the same manner, and with like effect, as a conversation had between individuals face to face. But the identity of the party against whom the conversation is sought to be admitted must be established by some testimony, either direct or circumstantial."

Also cited in 105 A.L.R. 326, 328, quoting from 1 R.C.L. 477.

The authors of 20 Am.Jur.Evi. 365, at 366, state the position of the law today as:

"To hold one responsible for statements and answers made over the telephone by

unidentified persons would open the door for fraud and imposition."

As to the threat itself, the law seems to be:

"But where there is no evidence connecting the defendant with the threats, such proof is inadmissible."

20 Am.Jur.Evi. 289, and 62 A.L.R. 133, 136.

(C) The Leonard-Stanley incident.

The zeal of counsel for the Appellee in defending Leonard is only equalled by their attack on Sica and Stanley -- Stanley, who had the courage to expose Leonard for what he really is. Remember, Leonard never reported the visit of his wife and his conversations with Palermo, and his discussions with Stanley about attempting to get the money his wife had sought from Palermo for the purpose of leaving the country until months after these incidents had occurred. He never reported - remember this - until shortly before the trial, and then no statements were taken from him.

Counsel for the Government said:

(1) "Sica must suffer the consequences of vouching for a corrupt accomplice."
(Appellee's Brief, p. 292)

(2) Referring to Stanley, "His role as a criminal emissary of Sica . . ."
(Appellee's Brief, p. 282)

(3) "Leonard exposed Stanley's attempt
to corrupt Leonard in a proposition
to pay Leonard to leave the country."
(Appellee's Brief, pp.269,290)

None of such accusations were supported by the record. They are but deductions which counsel would seek to make and have this Court draw.

It should be borne in mind that Leonard's wife approached Palermo for \$25,000.00 (RT 1265). At that time Leonard admitted he was willing to go to Philadelphia, willing to accept the \$25,000.00 from Palermo, and he had talked to his wife about the money offer which he had solicited.

Leonard's only explanation is, "At that time I would have accepted anything I could get . . . I was destitute and scared to death. . ." Leonard had that very day talked with his wife about "25 big ones", meaning \$25,000.00.

If Leonard's wife did not approach Palermo and seek to get the \$25,000.00 for herself and husband, why did the Government fail to call Mrs. Leonard and permit her to deny this?

Leonard asked Stanley to contact Sica for one purpose only - - to see if he could get him to assist in getting the money his wife had solicited. Sica never once approached Leonard on this money matter. This was a plain, unadulterated "shake down" attempt on Leonard's

part.

Little has been said about Joey Dorando, a boxer who was acquainted with both Sica and who had boxed for Leonard. His relations were friendly with both Leonard and Sica, and in January, 1960, he went to Leonard, at the Gossett-Ames Agency, and there negotiated for the purchase of a car. While he was there, Leonard asked Joey Dorando if he would see Sica and ask Sica to come and see him, in these words, "Tell him to come here and see me." Dorando replied that Sica only came into the cafe for dinner (RT 2997). (Dorando's father operated a well known eating place on Vine Street, in the heart of Hollywood.)

Leonard's testimony was shown to be full of falsehoods.

As was said in Mesarosh v. United States, 352 U.S. 1, 9 L.Ed. 1, 77 Sup.Ct. 1:

"Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity. This is a Federal criminal case, and this Court has supervisory jurisdiction over the proceedings of Federal Courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity."



CONCLUSION

For the reasons stated, we respectfully pray
that the orders appealed from be reversed.

Respectfully submitted,

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